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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION
MDL Docket No. 1657

GLENN L. DIER, ET AL.,

Petitioners,

v.

MERCK & CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a transferee court use its authority pursuant to 28 USC §1407 to invoke the judicially-created "quasi-class action" doctrine to preside over a mass settlement involving thousands of widely divergent personal injury actions and permit such a settlement to be approved outside the strictures of Rule 23 of the Federal Rules of Civil Procedure without contravening Article III and depriving individual litigants of their rights guaranteed by the due process and right to jury trial clauses of the Constitution of the United States?

RULE 14.1(b) STATEMENT

The petitioners, who were the plaintiffs-appellants below, are Carol Adelberg, Geraldine M. Alapeck, Adnan A. Aljibory, Antonio Amendoeira, Helen Bilik, Elizabeth Boone, Albert D. Cadwell, Samuella Cadwell, Manuel Carniero, Marjorie Connolly, Wilbert Corprew, Carolyn S. Croft, Rodney Darrow, Alphonse V. DeRosa, Carlo DeVincentiis, Glenn L. Dier, Kristina Donahue, Robert Gates, Herbert Gehm, Charles Harris, Jr., Sheila L. Hickok, Joanne Hochrun, Kathleen Hoffner, Suzanne Holdredge, Rosemary T. Holobosky, Frank P. Kunik, Kimberly Lindsey, Mary J. Mahar, Ronald R. O'Connor, William Patrick, Kevin Pitcher, Elsa Plocek, Marianne Raftis, Thomas J. Roman, Rosana Robinson, Dean Santacrose, Ronald H. Schaffer, Stasia Simmons, Sheila Smith, Victoria Smith, Margaret Steinhoff, Thomas J. Sullivan.

The respondent, who was the defendant-appellee below, is Merck & Co., Inc. (now Merck Sharpe & Dohme, Inc.

RULE 29.6 STATEMENT

Petitioners state that they are all individuals plaintiffs and are not corporate entities.

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OPINIONS BELOW

The opinion of the Court of Appeals is not reported in F.3d, and is unofficially reported at 2010 WL 2802352 (5th Cir. 2010), and is reprinted in the Appendix to this petition. (App. 1a-14a.) The opinion of the district court is not reported in F.Supp.2d, and is unofficially reported at 2009 WL 1158887 (E.D.La., 2009). (App. 17a-25a.) The order of the Court of Appeals denying rehearing and suggestion for rehearing *en banc* is not reported. (App. 15a-16a.)

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 2010. The order denying petitioners' timely motion for rehearing *en banc* was entered on August 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article III, Section 2, Clause 1 of the United States Constitution, which provides:

> Clause 1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to

> Controversies between two or more States;—between a State and Citizens of another State; (See Note 10)—between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This case also involves the Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Seventh Amendment to the United States Constitution which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS INVOLVED

The question presented by this petition involves Rule 23(a),(b), (c)(4) and (5), and (e) of the Federal Rules of Civil Procedure, entitled "Class Actions," which provide in relevant part:

> (a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to

individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting te class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the

prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c)... (4) **Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

...

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all classs members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement, unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

The question presented by this petition further involves 28 U.S. C. § 1407(a) and (b), entitled "Multidistrict litigation," which provides in relevant part:

(a) When civil actions involved one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. *Provided however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee

> district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.

This case involves the Rules Enabling Act, codified at 28 U.S.C. § 2072, which provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

Petitioners' personal injury lawsuits against respondent Merck & Co., Inc. ("Merck"), arose out of ingestion of the drug rofecoxib sold under the trade name Vioxx, and were filed in state and federal courts

in New York before being transferred to MDL No. 1657. (App. 4a.)[1]

Vioxx belongs to a class of drugs known as NSAIDs (non-steroidal anti-inflammatory drugs) which are prescribed for pain relief, and provide pain relief by inhibiting production of cyclooxygenase (COX), the enzyme which produces prostaglandins responsible for pain and inflammation. *See In re Vioxx Prods. Liab. Litig.*, 401 F.Supp.2d 565, 570 (E.D.La. 2005). After private pharmaceutical laboratories discovered the COX enzyme had two components, one providing protection of the stomach lining (COX-I) and the other pain relief (COX-II), Merck was able to isolate COX-II and develop Vioxx to be promoted as providing pain relief without gastrointestinal side effects associated with traditional NSAIDs. *Id.*

The FDA approved Vioxx in May 1999 for sale in the United States to relieve pain from chronic or acute inflammation associated with osteoarthritis, rheumatoid arthritis and other musculoskeletal conditions. *Id.* Merck had an aggressive marketing campaign garnering larger U.S. marketshare than rival Pfizer, Inc.[2] *Id.*

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1. */Petitioners draw the following alleged facts from their complaints and public documents of which the Court may properly take judicial notice. *Tellabe, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007).

2. The district court found an estimated 105 million prescriptions for Vioxx written in the United States between May 1999 and September 2004 leading to an estimate of 20 million patients having taken Vioxx. *See In re Vioxx Prods. Liab. Litig.*, 2008 WL 328 5912 (E.D.La. 2008).

However, by September 30, 2004, Merck withdrew Vioxx from the U.S. marketplace because data acquired in the course of clinical trials indicated Vioxx increased the risk of adverse cardiovascular consequences. *Id.*

It was not long before multiple lawsuits were filed in both state and federal courts throughout the country, and on February 16, 2005, the Judicial Panel on Multidistrict Litigation directed Vioxx cases pending in federal courts be centralized and designated as MDL No. 1657, and assigned them to the Honorable Eldon E Fallon in the Eastern District of Louisiana. (App. 2a.)[3] Petitioners' 27 cases were pending in New York federal courts and transferred to MDL No. 1657, and are among thousands alleging cardiovascular injuries that did not include heart attack, ischemic stroke or sudden cardiac death. *See In re: Vioxx Prods. Liab. Litig.*, 574 F.Supp.2d 606, 611-12 (E.D.La. 2008).[4]

When MDL No. 1657 was assigned, Judge Fallon already had some Vioxx cases pending in his district, and he began moving the cases toward trial. In a decision ruling on *Daubert*[5] issues, Judge Fallon, after succinctly summarizing plaintiffs' scientific position,

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3. *See also, In re Vioxx Prods Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

4. The district court observed "there are approximately 50,000 eligible claimants currently enrolled in the Vioxx Settlement Program, all of whom are subject to the same settlement matrix for awarding points and valuating claims." *Id.*, 574 F.Supp.2d at 611-12.

5. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

rejected Merck's motions to preclude various plaintiff experts from testifying even short-term use of Vioxx increases the risk of heart attacks and heart disease accepting testimony by plaintiff's experts it accelerates atherosclerosis. *Id.*, 401 F. Supp.2d at 572, 582-587. The *Daubert* rulings made clear the adverse cardiovascular consequences stemming from ingestion of Vioxx were not limited to heart attacks, ischemic strokes or sudden cardiac death. *Id.*

"In November 2006, [Judge Fallon] denied certification of a nationwide class because the plaintiffs' claims raised choice-of-law hurdles and numerous individualized questions of fact. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458-59, 461 (E.D.La. 2006)." (App. 3a.) He held six bellwether trials with thirteen (13) additional cases tried before juries in state courts with mixed results. *In re Vioxx Prods. Liab. Litig.*, 574 F.Supp.2d 606, 609 (E.D.La. 2008). "With the benefit of experience from these bellwether trials, as well as the encouragement of the several coordinated courts," he appointed a small group of attorneys to serve as the "Negotiating Plaintiffs' Counsel" ("NPC"), and "the parties soon began settlement discussions in earnest." *Id.* The district court has described the negotiations as follows:

> FN 5. In their efforts to develop a comprehensive, joint settlement agreement, counsel for Merck and the Negotiating Plaintiffs' Counsel (NPC) met together more than fifty times and held several hundred telephone conferences. Although the parties met and negotiated independently, they kept

> this Court-as well as the coordinate state courts of Texas, New Jersey, and California-informed of their progress in settlement discussions.

Id., at 609 n.5.

The district court describes the outcome of the negotiations thusly:

> On November 9, 2007, Merck and the NPC formally announced that they had reached a Settlement Agreement. *See* Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, MDL 1657 (E.D.La. Nov. 9, 2007) ("Settlement Agreement"), available at *http:// www. browngreer. com/ vioxx settlement.*[] The private Settlement Agreement establishes a pre-funded program for resolving pending or tolled state and federal Vioxx claims against Merck as of the date of the settlement, involving claims of heart attack ("MI"), ischemic stroke ("IS"), and sudden cardiac death ("SCD"), for an overall amount of $4.85 billion. Id. § "Recitals".[] The Settlement Agreement is a voluntary opt in agreement and expressly contemplates that this Court shall oversee various aspects of the administration of settlement proceedings, including appointing a Fee Allocation Committee, allocating a percentage of the settlement proceeds to a Common Benefit Fund, ap proving a cost assessment, and modifying any provisions of the Settlement

> Agreement that are otherwise unenforceable.[] Accordingly, this Court has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner.[]

In re Vioxx Prods. Liab. Litig., 650 F.Supp.2d 549, 552-53 (E.D.La. 2009) [footnotes omitted].

However, announcing the MSA was not the only activity that date:

> On November 9, 2007 the district court entered several pre-trial orders with respect to the claims of those plaintiffs who could not or chose not to participate in the MSA. PTO 28[] required non-settling plaintiffs to notify their healthcare providers that they must preserve evidence pertaining to the plaintiffs' use of Vioxx. Plaintiffs were also required to produce pharmacy records and medical authorizations, answers to interrogatories, and a Rule 26(a)(2) report from a medical expert attesting that the plaintiff sustained an injury caused by Vioxx and that the injury occurred within a specific time period. Failure to comply could result in dismissal of the plaintiffs' claims with prejudice.[]

(App. 3a-4a, footnotes omitted.) PTO 28 mirrored the MSA limiting compensation to heart attacks ischemic

strokes and sudden cardiac death in its definitions section. *See* PTO 28 III and MSA 2.2.1.1. PTO 30 imposed a stay of discovery by plaintiffs but not Merck, while PTO 31 enforced the terms of section 1.2.8 of the MSA by requiring all plaintiffs' counsel of record to register all claims in which they had an interest and to recommend to each client that they enroll in the MSA. (App.4a.)

PTO 28 contains lengthy directives to plaintiffs, and permits Merck to move for dismissal for *any* deficiency in complying, as evinced by the fact petitioners' cases were all dismissed solely for the failure to submit the required expert report, even though they otherwise complied. (App.24a.) PTO 28 also duplicated the preservation requirements already imposed in PTO 1, even though the record was devoid of any pre-MSA dispute between the parties raising any violations of PTO 1.[6]

These PTOs were not the result of any motions practice. Instead, they served notice on plaintiffs that if they did not consent to the MSA terms, the sword of dismissal was hanging over their heads for any discovery deficiency and would come down hard and without recourse to any protections provided for in Rule 26. In that regard, PTO 28 required hiring experts to provide:

> A Rule 26(a)(2) case specific expert report from a medical expert attesting (i) to a

6. PTO 1 directed "counsel is under an obligation to the court to exercise all reasonable efforts to identify and notify parties and nonparties, including employees of corporate and institutional parties...." PTO 1, paragraph 13.

> reasonable degree of medical probability that the Plaintiff or Claimant suffered an injury and (ii) that Vioxx caused the injury. The case specific expert report must include (i) an explanation of the basis of the attestation that Vioxx caused the Plaintiff or Claimant to suffer the injury, (ii) an identification of any other caues that were considered in formulating the opinion, (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) ...identification of all documents relied upon by the expert in forming his opinions.

PTO 28, MDL Document 12962, at p. 4. PTO 28's burden in this regard was not only expensive and wasteful, it gave Merck a litigation advantage backed up by PTO 30 which "imposed a stay of discovery . . . , with the exceptions for discovery activities required by PTO 28 and previously scheduled...depositions." (App. 4a.)

Petitioners argued from the outset that the MSA and PTO 28 should be construed *in pari materia* in light of the history of their genesis. On December 7, 2007, one month after the MSA was announced, some instant petitioners along with other plaintiffs, filed a notice of appeal to the Fifth Circuit of Judge Fallon's entry of PTOs 28 and 30. Merck moved to dismiss the appeal and the Fifth Circuit granted dismissal on March 28, 2008. (App. 19a.)

Shortly thereafter, another group of plaintiffs, identified by counsel's name as the "Oldfather plaintiffs,"

sought modification of PTO 28 on the grounds its requirements were "premature and unfairly burdensome." (App.5a.) These arguments were rejected by the district court in a subsequent order in August 2008 setting a schedule for expert reports.

On June 30, 2008, the "Benjamin plaintiffs," including some of the instant petitioners, moved against the MSA and PTO28, citing failure to comply with Rule 23 requirements, and seeking more extensive relief, including vacating the MSA, modifying PTO 28 and entering a protective order pursuant to Rule 26(c). (*Id.*) The motion sought to modify PTO 28 to allow submission of expert affirmations in two cases representative of particular cardiovascular injuries in issue to demonstrate they add little to the information already provided in the fact sheets, and to show requiring such reports gives Merck a substantial trial advantage in later using the abbreviated opinions to discredit the expert's credibility at trial. Petitioners submitted bills for the expert's services in the two representative cases to demonstrate the litigation costs provided no benefit to the court in managing the litigation, yet drove up plaintiffs litigation costs.

On November 26, 2008, Merck moved to dismiss petitioners' cases pursuant to Fed.R.Civ.Pr. 41(b) on the grounds of failure to meet the discovery requirements, and on December 3, 2008, the district court issued an order to show cause why the actions should not be dismissed for failure to provide the case specific expert report required by PTO 28. (App. 6a.)

About a week later, before petitioners's opposition was due, the court entered its Order & Reasons decision

dated December 11, 2008, denying petitioners' aforementioned motion to vacate the MSA and for other relief, rejecting their argument the MSA and PTO 28 should be construed *in pari materia*, ruling:

> Despite the Benjamin Plaintiffs' rather unspectacular argument that plaintiffs' lead counsel may not bind the litigants in an MDL to a settlement agreement, the Benjamin Plaintiffs are unable to show how in fact they are "bound" by the terms of the private, opt-in settlement they seek to vacate. Lacking any support for that argument and legal precedent, the Benjamin plaintiffs appear to base their request more on their own individual desire to rewrite the terms of the settlement.

MDL Record Document 17394, at p.7. The court further ruled the motion seeking relief from PTO 28, which it characterized as a *Lone Pine*-type order, "amounts to little more than a thinly-veiled motion to vacate the order." *Id.*[7]

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7. *Id., at pp. 3, 8-9.* Although not so called when issued with the MSA, the Fifth Circuit accepted that, "PTO 28 is characterized as a *Lone Pine* order" (App.3a, n.1). Petitioners asserted below that a *Lone Pine* order and Rule 41(b) are not appropriate discovery sanctions, particularly because the Vioxx litigation involves only one defendant, the plaintiffs submitted their pharmacy and medical records showing ingestion, and the district court's own opinions repeatedly set forth the straightforward nature of the case against Merck, arguments which both the district court and the Fifth Circuit rejected. (App. 12a-13a.)

This was followed by the April 29, 2009 order dismissing petitioners' cases with prejudice. (App.15a-25a.)

The Court of Appeals similarly rejected petitioners' arguments they were entitled to procedural and structural protections set forth in Rule 23, and, with little discussion, adopted the fiction that the MSA was a private opt–in settlement agreement to resolve claims for those plaintiffs who met the criteria set forth in MSA section 2..2.1.1 and PTO 28 III, and did not reach the constitutional dimensions by concluding petitioners were "non-settling parties" who did not have standing to challenge the MSA. (App.7a-8a.)

REASONS FOR GRANTING THE PETITION

I.

A QUESTION OF EXCEPTIONAL PUBLIC IMPORTANCE IS PRESENTED TO RESOLVE THE QUESTION OF WHETHER TRANSFEREE DISTRICT COURTS EXERCISING MANAGERIAL AUTHORITY UNDER 28 USC 1407 MAY EXTEND THEIR AUTHORITY TO OVERSEE LARGE-SCALE MASS SETTLEMENTS AMONG LITIGANTS WITH WIDE AND DIVERGING INTERESTS WITHOUT ADHERING TO THE STRICTURES OF RULE 23.

This Court made clear no global compromise of a class action could be achieved without "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*

Products, Inc., v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L. Ed. 2d 689 (1997). On its face, the Vioxx MSA established a nationwide administrative claims regime similar to the schemes that were before this Court in *Amchem*, and later in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999).

Contrary to the letter and spirit of *Amchem* and its progeny, the managerial authority conferred upon multidistrict transferee courts pursuant to 28 U.S.C. §1407 is being used to create class settlements outside Rule 23, as was recently captured by the district court's recent rulings on common benefit fees which indicate the Master Settlement Agreement is simply part of a process whereby "class actions morph into multidistrict litigation, as is the current trend." *See* 10/19/10 Order & Reasons, MDL Rec.Doc. 54040, at p. 11. This is consistent with Judge Fallon's statements in a law review article that: "By virtue of the temporary national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations." Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008). That article goes on to opine:

> [W]hen the structure provided by the transferee court breaks down upon the dissolution of an MDL, that is, when cases are remanded to the districts from which they originated, it becomes exceedingly difficult to organize and achieve a global settlement of related claims. The institutional value of the transferee forum in this respect is beyond dispute.

Id., at n.77. Petitioners respectfully submit Judge Fallon describes a "trend" that not only impermissibly intrudes into the legislative sphere, but runs roughshod over constitutional rights of individual litigants, such as petitioners, who "morph" from absent class members into "non-settling plaintiffs" by judicial override of Rule 23.

Indeed, although no global settlement has been as bold as the Vioxx MSA, in the past decade federal judges have made an end run around Rule 23 by impermissibly expanding the limited reservoir of authority conferred by 28 USC § 1407 and sought to provide a doctrinal basis for avoiding their fiduciary duties to absent class members by creating a quasi-class action. The Fifth Circuit is the first federal appellate court to review such an agreement with approval, albeit without passing on its legality by skirting that issue based on its erroneous conclusion petitioners did not have standing to challenge the MSA by classifying to them as "non-settling plaintiffs." (App.2a.)

II.

THE JUDICIALLY CREATED QUASI-CLASS ACTION CONTRAVENES ARTICLE III OF THE UNITED STATES CONSTITUTION AND RULES ENABLING ACT, AND DEPRIVES PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TRIAL BY JURY.

Only two years after *Amchem* another settlement class came before the Court in the context of a limited fund rationale seeking certification pursuant to

Fed.R.Civ.Pr. 23 (b) (1) (B), and the Court stated it should be obvious after *Amchem* that classes with diverse interests must be divided "into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, 119 S.Ct. 2295, 2319, 144 L.Ed.2d 715 (1999). The district court below expressly recognized the wide and diverse interests among the litigants in MDL 1567 in its decision denying class certification the year before the MSA was announced. *In re Vioxx Prods. Liab. Litig.*, 239 F. R. D. 450 (E. D. La. 2006). Yet, there should be no doubt that when the district court appointed the NPC to negotiate with Merck on behalf of the wide and diverse group of litigants with actions pending in the United States, the settlement talks were to be aimed at crafting a national settlement that would provide an administrative compensation regime for all pending Vioxx personal injury actions in this country.

It is equally clear the product of the negotiations between Merck and the NPC bears all the hallmarks of legislation including extinguishment of claims otherwise viable under the tort laws of the states. It turned the adversarial system topsy-turvy with lawyers purportedly representing the litigants turning against them and joining Merck in opposing the efforts of plaintiffs seeking relief from PTO 28. It reached well beyond other global settlements achieved outside the parameters of Rule 23 by jettisoning a fundamental armament of the adversarial system, the ability of a litigant to rely on independent judgment of their counsel.

The Fifth Circuit erred in the first instance by classifying petitioners as non-settling parties when in fact they were absent class members. This error was then compounded by building one fiction on top of another, namely, ruling the MSA is a private opt-in agreement – which it is in name only – and, secondly, that plaintiffs who agreed to its terms did so voluntarily and intelligently. In addition to fiction-building, Merck confronted *Amchem* head-on by arguing in the Fifth Circuit that petitioners' approach, namely, adhering to Rule 23, "would essentially sound the deathknell for most mass tort settlements." Brief of Appellee Merck, Case 09-30446, Document 0051948715, at p. 26.

Indeed, Merck sought to characterize the playing field as petitioners demanding their day in court when in fact this was never the case since petitioners only demanded the court adhere to the fiduciary duties mandated by Rule 23 and did not in any respect deny the fact that a representative suit may be an appropriate vehicle to resolve their claims.[8] The importance of the issues raised by petitioners is that, absent this Court

8. *Id.*, at p. 27. Ironically, Merck pointed to notice difficulties in class actions stating the obvious fact that due process protections can never ensure even those members who receive notice will either read or understand it. It is ironic because the only information these class members received came after the MSA was a *fait accompli* and it was aimed not at individual litigants but their counsel, namely, the definitions section of PTO 28. In marked contrast to Rule 23's requirement that class members be given the best notice practical under the circumstances, PTO 28 stated loud and clear that any plaintiff with a cardiovascular injury other than heart attack, ischemic stroke or sudden cardiac death should not expect any

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putting a halt to the trend described herein, the federal courts will be able to create *de facto* class actions at will outside the strictures of Rule 23. The practical effect may be seen in the instant litigation in that it empowers defendants, who are inevitably large-scale corporations, to use their wealth and resources to dictate the terms of settlement.[9]

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compensation in this litigation. Rule 23's notice requirement is also turned topsy-turvy in that instead informing class members of their rights, PTO 28 informed their counsel they had no rights. See, e.g., *In re Nissan Motor Corp. Antitrust Litig.*, 552 F. 2d 1088, 1104-05 (5th Cir. 1977) [The notice "must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member."] To the extent one does not interpret PTO 28 section III as an extinguishment of claims, it unmistakably tilts the notice decidedly in favor of Merck.

9. *See, e.g.* Prof. Wolfram's conclusion "no system of professional ethics could assuredly keep the lawyers conduct within acceptable realms when the riches of Croseus on how about as a reward to any lawyer with the client, money, skill and pluck to try. Charles W Wolfram, *Mass Torts-Messy Ethics*, 80 CORNELL L.REV. 1223, 1228 (1995). Although there is no record to determine the extent of the trade-offs made in this litigation, the PSC did state: "Initially, Merck would only negotiate cases in which a myocardial infarction (MI) was alleged to have been caused by Vioxx ingestion. After more than eight months of negotiation, the substantive talks were modified to also cover ischemic strokes (IS) alleged to have been caused by Vioxx ingestion. MDL Rec.Doc. 13370, at 2. Although it is not clear if this coincided with Merck's agreement to include $480 million in attorneys fees, in *Ortiz*, this Court observed that, with "an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant." *Id.*, 527 U.S. at 853 n.30, 119 S.Ct. at 2318 n.30.

Indeed, the concern about empowering wealthy litigants goes back to colonial times as reflected by the following arguments asserting the right to trial by jury should be included in the Constitution:

> The powers of the court of equity, vested by this Constitution, and the tribunals of Congress; powers which did not exist in Pennsylvania unless so far as they can be incorporated with jury trial, in this state, greatly contribute to this event. The rich and wealthy suitors would eagerly lay hold of the infinite mazes, perplexities and delays, which a court of chancery, with the appellate Palace of the Supreme Court in fact as well as law would furnish him with, and thus the poor man being plunged into the bottomless pit of legal discussion, would drop his demand and despair.

Dissent of the Minority of the Pennsylvania Convention, December 18, 1787, *The Debate on the Constitution, Federalist and Anti-federalist Speeches, Articles and Letters During the Struggle over Ratification, Part One*, Penguin Putnam Inc., p. 540.

Fast-forward some two centuries and petitioners find themselves in precisely the position described above with the merits of their claims submerged by the district court for failure to adhere to a discovery order engineered by Merck and subsequently approved by the Court of Appeals through its erroneous interpretation of this Court's standing doctrine. Indeed, in *Amchem* this Court instructed the safeguards provided for by

rule (a) and (b) were set for the protection of absent class members and serve to "inhibit appraisals of the chancellor's foot kind" at 521 U.S. at 621, 117 S.Ct. at 2248. Since there is precious little in the record which permits any substantive review of the settlement achieved below, the result obtained permits the inference the power of the purse had an influence in letting a wealthy defendant get out cheap.

In *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008), this Court held the due process clause prohibited a judgment entered against one person seeking information under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, to bind a different party seeking the identical information absent either an agreement or evidence of collusion between the two requesters. *Id.*, 553 U.S. at 885, 128 S.Ct. at 2167-68. This Court held that to invoke collateral estoppel against a subsequent party would amount to developing a doctrine of virtual representation that would enable courts to "'create a *de facto* class action at will.'" *Id.*, 553 U.S. at 901, 128 Ct. at 2176, quoting *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998). Here, the district court's appointment of the NPC to represent the divergent interests of the litigants with personal injury actions pending throughout the United States in negotiations with Merck is similarly based on a virtual representation doctrine that circumvents due process here by avoiding the strictures of Rule 23.[10]

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10. The only alternative basis upon which to rest the district court's conferring authority to bargain upon a small group of attorneys is the equally impermissible foundation of the district court's "gestalt judgment or overarching impression of the

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Petitioners submit Judge Kozinski astutely identified a similar trend, namely, "a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice." *In Re: American Continental Corporation/Lincoln Savings & Loan Securities Litigation Lexecon Inc., v. Milberg Weiss Bershad Hynes & Lerach*, 102 F.3d 1524, 1540 (9th Cir. 1996) [dissenting op.]. Ten years later, the Ninth Circuit stated because "multidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts," the district court necessarily had to enjoy broad ranging discretionary authority to manage litigation. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006).

In *In re Patenaude*, 210 F.3d 135, 142-146 (3d Cir. 2000), the Third Circuit relied upon this Court's decision in *Lexecon* to interpret the terms "coordinated or consolidated" broadly in holding the transferee court enjoyed wide discretion in managing all pretrial proceedings [rejecting remand motions based on

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settlement's fairness." *Amchem*, 521 U.S. at 621, 117 S. Ct. at 2248. The district court below on several occasions sought to explain the significant effort by both the court and negotiating counsel to achieve settlement which it clearly believed was fair. Petitioners respectfully submit, as the Third Circuit explained, "without determining that the class was adequately represented, the district judge has no real basis for assuming that the negotiations satisfactorily vindicated the interests of all absentees" . *In re General Motors Corp. Pick Up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3rd Cir. 1995).

premise settlement negotiations, even if not involving the individual cases seeking remand, were nevertheless pretrial proceedings that warranted denying remand].

Perhaps the broadest description of the authority enjoyed by a transferee court was Judge Fallon's recitation that: "In reality, there is only one true limit on a transferee court's authority, namely, that a transferee court cannot unilaterally transfer cases to itself for trial." Fallon, et al., *supra*, 82 TUL.L.REV. at 2328.

The reservoir of managerial authority a transferee court necessarily delegates to counsel to move the litigation forward has allowed capable defense counsel to shape the factual scenarios to create a legal web enabling them to employ any number of doctrines to ensure any recalcitrants do not reach the courthouse steps on the merits of their claims, but rather become entangled in a web woven for the express purpose of shielding the final resolution achieved without the benefit of adversarial investigation rendering any judicial review wholly illusory.[11] This is especially the case by the time all counsel have achieved an agreement such as the MSA, at which point they present a unified

11. Prof. Leubsdorf, describing the evolution of class actions, characterized the third stage as where the defendants and their lawyers begin to manipulate class actions for their own benefits, asserting "the class-action, in short, has always been up for grabs. Whether it helps the powerless or the powerful, whether it makes remedies available or extinguishes them, will depend on the choices that lawyers, scholars, judges and legislators make." John D. Leubsdorf, *Co-opting the Class-Action*, 80 CORNELL L. REV. 1222, 1227 (1995).

position to the court, opposing absentees and any others who seek to challenge the result they achieved. The district court is hampered by both lack of adversarial presentation on the one hand and hydraulics of moving a large-scale settlement such as the one at bar.

These machinations virtually guarantee one or another legal doctrine will be invoked to dispose of recalcitrants without reaching the merits of their claims. *See Amchem, supra,* observing "the court would face a bargain proffered without benefit of adversarial investigation" and the "parties 'may even put one over on the court, in a staged performance'...." *Id.*, 521 U.S. at 621, 117 S.Ct. at 2249, quoting Judge Easterbrook's dissent from denial of a rehearing *en banc* in *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996).

It therefore should be no surprise the MSA has been hailed as a "tremendous victory for Merck, because the company's potential liability exposure was projected to be substantially higher." *See* Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation,* DEPAUL L.REV., Vol. 57:509, 510 n.6 (2008) [noting Wall Street had previously estimated Vioxx would cost Merck as much as $25 billion to settle]. Indeed, currently there is little substantive basis for reviewing either the reasonableness or fairness of the MSA, not merely in terms of dollar amount but with respect to the fact that more than one third of the natural class of litigants with personal injury actions

pending in the United States as a result of Vioxx ingestion were excluded from any compensation.[12]

In *Ortiz* this Court indicated it was "a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class[.]" *Id.*, 527 U.S. at 854, 119 S.Ct. at 2319. Although it is difficult, if not impossible, to discern how many potential litigants were dissuaded by PTO28's definitions section from commencing or discontinuing suits that had been filed, there is some concrete proof some 34.13% of the class who entered the compensation regime created by the MSA received nothing. Judge

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12. The fact that Merck won the majority of cases early on in the litigation is clearly offset by the fact that when plaintiff verdicts did come in they were multimillion dollar verdicts with significant punitive damages included. *See* McClennan, *supra*, 57 DEPAUL L.REV. At 510, n.5. Moreover, most defense wins were centered on the individual plaintiff's inability to prove specific causation so that, given Merck's inability to convince juries its conduct was proper as the litigation matured, there was substantial likelihood plaintiff verdicts would increase. *Id.* The district court below concluded that by the time the Vioxx settlement was announced the instant litigation was "an extremely mature litigation." PTO 29 section III. C. In fact, the litigation had few of the hallmarks of mature litigation since none of the cardiovascular injuries other than heart attacks or strokes were presented to the juries and litigation stopped before plaintiffs' counsel developed sufficient experience to defeat the sophistry offered by Merck to muddy the water on individual causation. *See, e.g.*, Francis E McGovern, *Resolving Mature Tort Litigation*, 69 B.U. L. Rev. 659, 659 (1989) [describing a mature tort as one where "there has been full and complete discovery, multiple verdicts, and persistent vitality in plaintiffs contentions."]

Fallon recently observed that some $4,353,152,064 was paid out to 32,886 out of 49,893 eligible and enrolled plaintiffs. *See* Judge Fallon's 10/19/10 Order & Reasons, MDL Rec.Doc. 54040, at p. 8. These numbers do not include plaintiffs such as petitioners herein who have been subject to the assembly line motions to dismiss arising from PTO 28.[13] In *Ortiz* this Court made clear the settlement class would not qualify "when, in the very negotiations aimed at a class settlement, class counsel agree to exclude what may turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent." *Id.*, 527 U.S. at 819, 119 S.Ct. at 2301.

Petitioner submits the instant case breathes real meaning into the concerns this Court observed in both *Amchem* and *Ortiz* and especially its conclusion that settlement classes require "heightened attention." *Ortiz, supra*, 527 U.S. at 849, 119 S.Ct. at 2316, citing *Amchem, supra*, 521 U. S. at 620. Judge Fallon may well be correct in his contention that, ""By virtue of the temporary national jurisdiction conferred upon it . . . the transferee court is uniquely situated to preside over global

13. Indeed, Rule 41(b) was used below to dismiss plaintiffs' cases with prejudice based on Merck's motions citing partial deficiency in complying with the extensive requirements for disclosures and certifications set forth in PTO 28, thus sidestepping Rule 37. It is respectfully submitted this practice is not favored or warranted. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); *see also Sentis Group, Inc., Coral Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 899 (8th Cir. 2009).

settlement negotiations" providing a "'once-in-a-lifetime' opportunity." Fallon, et al., *supra*, 82 TUL.L.REV. at 2340. It is, however, an argument that must be directed to Congress since there is no doctrine that can emanate from 28 USC §1407 that would provide a rationale for the district court employing its managerial authority to morph into overall resolution of class actions. In light of the same, the doctrinal basis underlying district court's authority to bring about settlement such as the one at bar was set forth by Judge Weinstein namely, quasi-class action.[14] Petitioners preface their discussion of the quasi-class action with the Fifth Circuit's decision they do not have standing to challenge the MSA.

Although petitioners were parties in MDL 1567 they were not parties to the negotiations that resulted in the MSA. After binding some 99.9% of litigants with personal injury actions pending in the United States (*see* Judge Fallon's 10/19/10 Order & Reasons, MDL Rec.Doc. 54040, at p.8), it should be hard to swallow Merck's argument that:

> The MSA is not a class settlement that resolve the specified group of claims unless members of the group affirmatively opt out of the deal; instead, it is a private, opt – in settlement that binds only those who take affirmative steps to accept the defendant's offer. Rule 23 does not apply.

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14. *In re Zyprexa Product Liab. Litig.*, 424 F. Supp 2d 488 (EDNY 2006).

Merck Brief, *supra*, at p.23. Yet, the Fifth Circuit did precisely that by holding:

> Because the MSA was structured as an "opt-in" private settlement rather than an "opt-out" agreement the Dier plaintiffs cannot show that they have suffered the type of legal prejudice that would afford them standing to challenge the MSA.

(App. 8a.)

The record below demonstrates among the reasons class certification was denied was the district court's finding that the named representative could not meet the adequacy of representation requirement which *Amchem* made clear required the exercise of the court's fiduciary duty to determine whether the "the interests of the class members will be fairly and adequately protected in their absence." *Amchem, supra*, 521 U.S. at 626, 117 S.Ct. at 2251, quoting *General Telephone Co. of Southwest v. Falcon*, 457 US 147, 157, n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Nothing changed about the inherent characteristics of class members or the nature of their personal injury claims – a plain fact the Fifth Circuit elected to disregard when mischaracterizing petitioners as non-settlers.[15]

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15. Petitioners bear none of the characteristics of so-called non- settlers in that they had no clue about negotiations regarding the MSA until it was presented as a *fait accompli*. As such they more closely resemble absent class members rather than non-settlers. *See, e. g.*, the Seventh Circuit's observation that: "Unnamed members of the class rarely will suspect a

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Although the Fifth Circuit apparently viewed the limiting of compensation to heart attacks, ischemic strokes and sudden cardiac death, together with the environment created by the quartet of orders that sprang up simultaneous with the MSA, as "'mere allegations of injury in fact or tactical disadvantage'" (App. 8a, quoting *Agretti v. ANR Freight Sys.*, 982 F.2d 242, 247 (7th Cir. 1992), it would never have reached this conclusion but for its erroneous characterization of petitioners' status. If petitioners were properly treated as absent class members it would not have been necessary to reach the aftermath created by the negotiations between Merck and the NPC. Indeed, this Court's decision in *Northeastern Florida Chapter Associated Gen. Contractors of America v. Jacksonville*, 508 US 656, 113 S.Ct. 2295, 124 L.Ed 2d 586 (1993), would have governed the facts and circumstances petitioners presented here. In *Northeastern Florida Chapter* contractors mounted a challenge to being excluded by the city from being able to participate in the bidding process and this Court held it was not the fact that they did not secure the contract that was the injury sustained but rather, "the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.*, 508 U.S. at 666, 113 S.Ct. at 2303.

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shortfall in the adequacy of representation before learning of the terms of a (potentially inadequate) settlement or problems in the class definition - and given the possibility of opt-out, even that may not occasion intervention.". *Crawford v. Equifax Payment Services*, 201 F.3d 877, 880-81 (7th Cir. 2000).

In *Ortiz* this Court made clear that reviewing whether or not Rule 23's protection should be afforded a court will look at practicalities including circumstances where the ability of the class or subclass to protect its own interests has been impaired. In viewing the issue of injury this Court has previously made clear that, although "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition," injuries "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise. " *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984). It is hard to see how being excluded from the bargaining table which generates the very agreement in which plaintiffs' claims are being traded off is not an injury. This is wholly aside from the creation of regime which restricts compensation of cardiovascular injuries otherwise viable and tort system to heart attacks, ischemic strokes and sudden cardiac death and then builds in an enforcement mechanism by placing individually retained plaintiff"s counsel in a financial vise can be considered an injury that is "too abstract, or otherwise not appropriate, to be considered judicially cognizable...." *Id.*, 468 U.S. at 752, 104 S.Ct. at 3325. Here, there is cognizable injury which can be established aside from the legal environment created by PTOs 28-31.

Petitioners submit the challenged action here is the district court's failure to adhere to its fiduciary duty and protect petitioners' interests in the negotiations that culminated in the MSA.[16] As such it is clear injury

16. Any notion petitioners did not suffer deprivation of a substantive right should be flatly rejected even though the

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can ultimately be traced to Merck who devised the strategy leading up to the MSA. Therefore, there exists a likelihood the injury will be 'redressed by a favorable decision.' *Lujan v. Defenders of Wildlife*, 504 US 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) [citation omitted].

III.

THE IMPORTANT QUESTION OF WHETHER THE "QUASI-CLASS ACTION" CONTRAVENES ARTICLE III AND THE RULES ENABLING ACT HAS NOT BEEN AND SHOULD BE SETTLED BY THIS COURT

Petitioners assert that the quasi-class action doctrine should be rejected because it not only contravenes the Article III constraints upon federal courts but violates the Rules Enabling Act which instructs that rules of procedure "'shall not abridge, enlarge or modify any substantive right, 28 USC [[2072 (b).'" *Amchem, supra*, 521 U.S. at 613, 117 S.Ct. at 2244.

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district court's duties may be characterized as procedural in nature. Prof. Richard L. Marcus has observed that particularly in federal mass tort litigation 'almost from the beginning, we have known that the distinction between substance and procedure can be as elusive as it is critical' 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." Richard L. Marcus, *Symposium: A Market Approach to Tort Reform Via Rule 23, May, 1995*, 80 CORNELL L. REV. 909, quoting *Guarantee Trust Co. v. York*, 326 US 99, 108, 65 S.Ct. 1464 (1945).

Although there are less than a handful of district courts that have subscribed to the newly created quasi-class action at least one commentator has taken the position that is sufficient to characterize the same as an "emerging doctrine that MDLs are 'quasi-class actions.'" Charles Silver and Geoffrey P. Miller, *"The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal"* (2009), New York University Law and Economics Working Papers. Paper 174, p. 7. The authors offer suggestions on managing an MDL for purposes of achieving global resolutions without a passing glance at Article III, let alone due process and Seventh Amendment rights that become submerged in an administrative labyrinth when judges function as managers rather than their true role as impartial adjudicators of disputes. Nevertheless the authors note concerns about the management of MDLs:

> By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, ridden roughshod over attorneys, turned a blind eye to questionable behavior, and weakened plaintiff lawyers' incentives to faithfully serve their clients.

Id., at p. 4. The author's concerns in many respects mirror the dangers inherent in settlement only classes which this court enunciated in both *Amchem* and *Ortiz*.

Petitioners submit the instant litigation demonstrates the quasi-class action doctrine affords no basis for judge to exercise any adjudicatory function in presiding over such a litigation and this is best reflected

by the fact that in each of the cases invoking the doctrine the courts did not do so until the tail end of the litigation when they were addressing attorney fee issues. *In re Zyprexa Prods. Liab. Litig.*, 238 F. R. D. 539 (E.D.N.Y. 2006); *In re Guidant Implantable Defibrillators Prod. Liab. Litig.*, 2008 WL 682 174 (D. Minn. 2008); *In re Vioxx Prods. Liab. Litig.*, 574 F.Supp.2d 606 (E.D.La. 2008). Although never mentioned directly in the decisions, they are bottomed on the view that the day in court principle has gone the way of the dodo bird.

The seminal decision on quasi-class actions is Judge Weinstein's opinion in *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488, 491 (E.D.N.Y. 2006), in which he rules:

> While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of the court.

In a series of decisions later the same year, Judge Weinstein invokes this doctrine by judicial fiat, flatly asserting:

> Like many MDL cases, the instant action can, as a practical matter, be characterized as a quasi-class action.

In re Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 540 (E.D.N.Y. 2006), citing *In re Zyprexa Prods. Liab.*

Litig., 451 F.Supp.2d 458, 2006 WL 2590402 (E.D.N.Y. 2006), and *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006). Judge Weinstein did nothing more than describe characteristics of an MDL and then baldly assert they provided the foundation for the doctrine of quasi-class action. *Id.*, at p 4. This is described by Prof. Issacharoff as follows:

> As initially formulated by Judge Weinstein, the salient features of the quasi-class action were, "[t]he large number of plaintiffs subject to the same settlement matrix approved by the court; the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement; the court's order for a huge escrow fund; and other interventions by the court."

Samuel Issacharoff, *Private Claims, Aggregate Rights*, 214 SUPREME COURT REV. 183, 215, n.102 (2008). Indeed, Prof. Issacharoff's observation perhaps captures the reason the notion of quasi-class-action is elevated to the status of a doctrine rather than a decision by judicial fiat which does not rest on anything more than raw judicial power, namely, Judge Weinstein's prominence in the field. Prof. Issacharoff states:

> As applied to harm cases by the indefatigable Judge Jack Weinstein, the term refers to a coordinated group of related cases whose joint supervision and aggregate resolution are subject to direct oversight and implementation by a court, usually an MDL court.

Id., 215. Indeed, Judge Weinstein has been called "a living legend." Silver, et al., *The Quasi-class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, (2009), *supra*, p.7 n.23.

Judge Weinstein initially[17] advanced his position in a proper forum, namely a law review article, as follows: "It is my conclusion... that mass consolidations are in effect quasi-class actions." Jack B Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW.U.L.Rev. 469, 480-81 (1994). Judge Weinstein characterizes this Court's decisions in *Amchem* and *Ortiz* as a

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17. Judge Weinstein has held the view that due process must be subordinated to the public interest implicated in mass torts even before he became a judge in that, in 1960, then Professor Weinstein wrote:

> The class-action constitutes an exception to two important principles of our procedure law: each person is free to determine whether, when and how to enforce the substantive rights; each person is entitled to his day in court before his rights are affected by a judgment. Powerful as they are, the abstract objections to being down by the action of others yielded long ago in bills of peace, to the practicalities of life and law, to the need to afford an effective remedy for the protection of rights and to the reduction of repetitive litigation. In class actions necessity makes due process.

Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 433-34 (1960). More recently, Judge Weinstein has written that the day-in-court rationale "had more force in the era of the horse and buggy." Jack B Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L.REV. DE NOVO 1, 14 (2009).

> . . . development [that] has led a number of judges and attorneys, particularly in pharmaceutical cases, to attempt mass settlements on a consolidated and cooperative basis without the formalities of a class action. The substitute quasi-class action aggregate technique has advantages and is being closely studied.

In re Zyprexa Prods. Liab. Litig., supra, 238 F. R. D. ast 541 [citation excluded]. As the instant litigation adequately reflects this amounts to leaving the lawyers wide latitude to reach global solutions with informal supervision at best only to have the final solution be presented as unified front. Defense counsel walk a straight line and can clearly be seen fit to act in the finest traditions of the profession when they seek to get the client office cheap as possible. They do so without the conflicting position plaintiffs' counsel find themselves facing multiple conflicts with regard to clients who have diverse interests, if indeed they have any actual clients, as well as their own financial interest which is implicated when a defendant such as Merck whips out the pot of gold that awaits them upon conclusion of the final resolution.[18]

It is interesting to note that Judge Weinstein has viewed the Class Action Fairness Act of 2005 ("CAFA") as "a good example of legislative efforts to allow mass national litigation to proceed on a consolidated basis in a single forum." *Zyprexa, supra*, 238 F.R.D. at 541.

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18. Here that conflict was built right into the MSA via section 1.2.8 cited with approval by the Fifth Circuit. (App. 4a.)

Perhaps. However, an equally compelling view was set forth by Judge Young, who wrote:

> It is precisely because MDL practice is perceived so clearly to favor the defense that Congress appears to have lost confidence in a judicial management mechanism that once had such great promise. The Class Action Fairness Act of 2005, Pub.L. No. 109-2, 119 Stat. 4 (2005), itself thought to be legislation that favors business defendants, *see Natale v. Pfizer, Inc.*, 379 F.Supp.2d 161, 164-68 (D.Mass.2005), contains an unmistakable rebuke to the Panel on Multi-District Litigation in Section 4, which provides that no class action removed to federal court under its provisions shall thereafter be transferred to another district pursuant to Title 28, Section 1407(a) of the U.S.Code without the request of a majority of plaintiffs.[ ] *See* Pub.L. No. 109-2, 119 Stat. 4, 11-12 (2005) (codified at 28 U.S.C. § 1332(d)(11)(C)(i)).

Delaventura v. Columbia Acorn Trust, 417 F.Supp.2d 147, 156 (D.Mass. 2006) [footnote omitted]. The debate raging among commentators is unlikely to calm down anytime soon; however, one thing is certain, this court is unlikely to have the opportunity to act in the context of the mass tort while still able to reverse a result that effectively closed the courthouse door to countless class members without ever reaching the merits of the claims.

The procedural safeguards mandated by Rule 23 combine with the court's fiduciary duty to absent class members to act as a shield against the machinations of sophisticated defense counsel who walk the straight line of getting the client off as cheap as possible, have the riches of Croseus to fund their machinations, the burgeoning vastness of MDL landscape to perform their machinations without benefit of adversarial judicial investigation or review, and hapless class members on the other side who are either underrepresented, unrepresented, or as here, represented by attorneys who had been placed in a irreconcilable conflict through the financial vise of losing fees for their entire inventories absent recommending to their clients they accept the MSA and enter the Vioxx Resolution Program, which was a pig in a poke for some while for more than one-third of them just an empty poke.

CONCLUSION

Based on the foregoing, this Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the final judgment by that court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 16, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30446

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

GLENN L. DIER, ET AL.,

Plaintiffs - Appellants

v.

MERCK AND COMPANY, INC.,
A Foreign Corporation,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:05-MD-1657

Before GARWOOD, STEWART, and CLEMENT, Circuit Judges. PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

In this mass tort multidistrict litigation (MDL) proceeding, thousands of plaintiffs alleged personal injuries resulting from the use of Vioxx, a drug manufactured by defendant Merck and Company, Inc. (Merck). Many of the litigants have arrived at an opt-in Master Settlement Agreement (MSA) to resolve claims for those plaintiffs who meet certain criteria. Glenn L. Dier and his fellow plaintiffs-appellants (the Dier plaintiffs) have not opted into the MSA. The district court issued a series of pre-trial orders, including pre-trial order 28 (PTO 28), which required that non-settling plaintiffs each produce a report from a doctor linking the alleged injury to use of Vioxx. The district court issued a show cause order for the Dier plaintiffs' failure to comply with PTO 28 and later dismissed the Dier plaintiffs' cases on that basis. We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September 2004, Merck withdrew Vioxx from the market when data revealed an increased risk of cardiovascular thrombotic events associated with the drug. *See In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565, 571 (E.D. La. 2005). Litigation soon followed and thousands of claims were filed around the country. *Id.*

1. Multidistrict Litigation

In February 2005, the Judicial Panel on Multidistrict Litigation ordered that the Vioxx litigation be "centralized, designated as an MDL, and assigned to" Judge Eldon Fallon. *Id.* Judge Fallon then directed the parties to address whether a class of personal injury plaintiffs could be certified under Rule 23. In November

2006, he denied certification of a nationwide class because the plaintiffs' claims raised choice-of-law hurdles and numerous individualized questions of fact. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458–59, 461 (E.D. La. 2006).

2. The Master Settlement Agreement

Settlement negotiations resulted in the MSA, which the parties presented to the district court on November 9, 2007. The MSA established threshold criteria for plaintiffs' eligibility to opt in. Section 1.2.8 of the MSA imposed the requirement that any plaintiffs' counsel enrolling clients in the MSA must affirm that she had recommended to 100% of her clients that they accept the terms of the MSA and must attempt to withdraw from representing clients who refused to accept the MSA terms. The MSA also designated Judge Fallon as its chief administrator.

3. The Pre-trial Orders

On November 9, 2007 the district court entered several pre-trial orders with respect to the claims of those plaintiffs who could not or chose not to participate in the MSA. PTO 28[1] required non-settling plaintiffs to notify their healthcare providers that they must

1. PTO 28 is characterized as a *Lone Pine* order, named for *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986). "*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000).

preserve evidence pertaining to the plaintiffs' use of Vioxx. Plaintiffs were also required to produce pharmacy records and medical authorizations, answers to interrogatories, and a Rule 26(a)(2) report from a medical expert attesting that the plaintiff sustained an injury caused by Vioxx and that the injury occurred within a specified time period. Failure to comply could result in dismissal of the plaintiffs' claims with prejudice.[2]

Pre-trial order 30 (PTO 30) imposed a stay of discovery so that plaintiffs could consider the MSA, with exceptions for discovery activities required by PTO 28 and previously scheduled *de bene esse* depositions. Pre-trial order 31 (PTO 31) enforced the terms of Section 1.2.8 of the MSA by requiring all counsel of record for plaintiffs to register all claims in which they had an interest and sign a "Registration Affidavit," in which they had to attest to whether they agreed to the terms of the MSA and would recommend that their clients enroll in the MSA.

4. Dier Plaintiffs' Dismissal

The Dier plaintiffs brought their Vioxx suits against Merck in state and federal courts in New York. Each case was then transferred to the MDL. The Dier plaintiffs have not opted into the MSA.

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2. Pre-trial Order 29 (PTO 29) is virtually identical to PTO 28, differing primarily because it applies to plaintiffs whose claims were transferred to the MDL after November 9, 2007 and therefore sets different deadlines.

Appendix A

Shortly after the MSA was announced and the pre-trial orders were entered, a group of plaintiffs (the Oldfather plaintiffs) filed a motion in the district court requesting modification or suspension of PTO 28 on the basis that its requirements were premature and unfairly burdensome. The district court rejected the Oldfather plaintiffs' arguments, but nonetheless extended the deadlines for PTO 28 "to ensure that all Plaintiffs have a fair opportunity to comply with this provision of PTO 28." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 745 (E.D. La. 2008).

One month after the Oldfather ruling, in June 2008, another group of plaintiffs (the Agard plaintiffs)[3] filed a motion making substantially the same arguments as the Oldfather plaintiffs in opposition to PTO 28. They requested another extension and sought to eliminate the expert report requirement of PTO 28. The Agard plaintiffs also argued that Judge Fallon's roles as MSA chief administrator and as coordinating judge of the MDL proceeding created an incurable conflict of interest, requiring Judge Fallon to resign as MSA administrator. They further asserted that the MSA should be vacated or declared void because it had not been subject to the requirements of Rule 23. In December 2008, the district court denied the Agard motion in its entirety.

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3. The Agard plaintiffs were also represented by the Law Office of Ronald R. Benjamin, counsel for the Dier plaintiffs. The Agard plaintiffs included some of the Dier plaintiffs.

Appendix A

In October 2008, the district court entered an order (the Conference Order) instructing eligible but non-settling plaintiffs to appear at one of three conferences to be held in different locations nationally. The stated purpose of the order was "to ensure that plaintiffs who are eligible for the Vioxx settlement program but who have not enrolled in the program . . . have all necessary information available to them so that they can make informed choices." The order directed counsel and plaintiffs themselves to appear in person at one of the conferences, although it expressly allowed plaintiffs to avoid this requirement for reasons of "physical or economic hardship." Many of the Dier plaintiffs claimed hardship and were excused from attendance. The Dier plaintiffs also moved the district court to vacate the order, contending that the only conceivable purpose of the conferences was for the court to engage in "advocacy for the settlement in an environment that is necessarily going to be viewed as coercive by the individual plaintiffs." The district court denied the motion.

In November 2008, Merck moved for an Order to Show Cause as to sixty-one plaintiffs (including the Dier plaintiffs) for "failure to provide a case-specific expert report as required by . . . PTO 28." In December 2008, the district court issued an Order to Show Cause. The Dier plaintiffs filed responses, arguing that they were in substantial compliance with PTO 28 and that New York law only required general causation proof. In April 2009, the district court dismissed the Dier plaintiffs' complaints with prejudice for failure to comply with PTO 28.

II. DISCUSSION

A. Standing to Challenge the MSA

The Dier plaintiffs first challenge the validity of the MSA. Standing, however, is a prerequisite to this court's exercise of jurisdiction. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496 n.1 (5th Cir. 2007) (en banc). This court has recognized that, in the context of class settlements, non-settling parties generally have no standing to challenge the settlement. *Transam. Refining Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992); *see also Agretti v. ANR Freight Sys.*, 982 F.2d 242, 246 (7th Cir. 1992) ("'[N]on-settling defendants in a multiple defendant litigation context have no standing to object to the fairness or adequacy of the settlement by other defendants.'") (quoting 2 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11.54 (2d ed. 1985)). The rationale behind this general rule is that settlement will not affect any substantive legal rights of non-settling parties. *Transam. Refining Corp.*, 952 F.2d at 900.

An exception to the general rule may apply if the settlement agreement strips non-settling parties of rights to contribution or indemnity, *see id.*, or in some other manner results in "plain legal prejudice" to a non-settling party. *Agretti*, 982 F.2d at 246–47; *see also Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160 n.10 (5th Cir. 1985) (stating that the court may consider "an attempt by a non-party to the settlement to void portions of the agreement that purport to affect the

rights of non-settlors"). But "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice." *Agretti*, 982 F.2d at 247.

Because the MSA was structured as an "opt-in" private settlement rather than an "opt-out" agreement, the Dier plaintiffs cannot show that they have suffered the type of legal prejudice that would afford them standing to challenge the MSA. The Dier plaintiffs therefore lack standing to challenge the MSA.

B. Judge Fallon's Decision to Not Recuse

The Dier plaintiffs contend that Judge Fallon cannot serve as both presiding judge in the Vioxx MDL and chief administrator of the MSA without presenting the appearance of partiality. They assert that Judge Fallon's dual roles "clearly permit[ ] an inference" that he encouraged participation in the MSA. Therefore, they argue, Judge Fallon must either recuse himself from the case or resign as chief administrator of the MSA.

Addressing the Dier plaintiffs' contentions in its order of December 10, 2008, the district court declined to recuse on the basis that:

> The facts of the instant case do not warrant recusal. As Chief Administrator of the [MSA], the Court serves in an administrative capacity that has no substantive effect on its management of the MDL proceedings. *See In re Vioxx Prods. Liab. Litig.*, MDL No. 1657,

> 2008 WL 4091672, at *2 (E.D. La. Aug. 27, 2008) (explaining that the Court "has consistently exercised its inherent authority over the MDL proceedings in coordination with its express authority under the terms of the Settlement Agreement to ensure that the settlement proceedings move forward in a uniform and efficient manner"). The Court played no role in drafting the private settlement agreement reached by the parties; the Court has taken no position as to what types of claims should or should not have been included in the settlement; and, finally, the Court has consistently stated that it neither encourages nor discourages participation in the settlement.

"A motion to disqualify is committed to the sound discretion of the judge and her decision will only be reversed if there has been an abuse of that discretion." *In re Hipp, Inc.*, 5 F.3d 109, 116 (5th Cir. 1993). The federal recusal statute provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) (citing S. REP. NO. 93-419, at 5 (1974) and H.R. REP. NO. 93-1453, at 5 (1974)). "Thus, it is critically important in a case of this kind to identify the

facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Id.* In applying § 455, the court employs an objective test, finding recusal warranted "if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 378 (5th Cir. 2002) (quotation omitted).

1. Encouraging Participation in Settlement

The Dier plaintiffs submit that the district court's statement that it "has consistently stated that it neither encourages nor discourages participation in the settlement" takes "too myopic a view" of the court's role as both chief administrator of the MSA and as presiding judge in the MDL litigation. They point to the Conference Order, which required all non-settling plaintiffs to appear at conferences "to ensure that plaintiffs who are eligible for the Vioxx settlement program but who have not enrolled in the program have all necessary information available to them so they can make informed choices," and argue that this order permits the inference that the district court encouraged settlement. The Conference Order, however, did not inappropriately encourage settlement. It "is not unusual to require the parties as well as counsel to appear at settlement conferences." *Bilello v. Abbott Labs.*, 825 F. Supp. 475, 479 (E.D.N.Y. 1993). For example, Federal Rule of Appellate Procedure 33 authorizes courts of appeals to "direct the attorneys—and, when appropriate, the parties—to participate in one or more

conferences to address any matter that may aid in disposing of the proceedings, including . . . discussing settlement. A judge or other person designated by the court may preside over the conference." FED. R. APP. P. 33. Nothing about the settlement conferences would give a reasonable observer any doubt about Judge Fallon's impartiality.

2. Appearance of Partiality

In support of their argument that the district court's impartiality could reasonably be questioned, the Dier plaintiffs assert that at least one plaintiff lacked confidence in the district court's impartiality as a result of its dual responsibilities. But because the test for impartiality is an objective one, *see IQ Prods. Co.*, 305 F.3d at 378, an individual plaintiff's subjective beliefs are irrelevant to the analysis.

For the reasons articulated by Judge Fallon, his decision not to recuse falls well within the bounds of his discretionary authority.

C. Pre-Trial Order 28 Requiring Production of a Doctor's Report

The Dier plaintiffs' final argument is that it was an abuse of discretion for the district court to issue the case-specific expert disclosure requirement in PTO 28. They contend that Merck was aware of the nature of their alleged injuries and the injuries' purported link to Vioxx. They further assert that even if issuance of

PTO 28 was generally within the district court's discretion, in instances where state law requires no expert opinion as part of the evidence to support the claim, imposing such a requirement is an abuse of discretion and contravenes the *Erie* doctrine. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938).

1. The Court and Merck were Already Apprised of Plaintiffs' Injuries

A district court's adoption of a *Lone Pine* order and decision to dismiss a case for failing to comply with a *Lone Pine* order are reviewed for abuse of discretion. *Acuna*, 200 F.3d at 340–41.

Relying on *Acuna*, the district court stated that "it is not too much to ask a plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 744. In *Acuna*, over 1,000 plaintiffs brought personal injury claims allegedly arising from uranium mining activities. The district court issued pre-discovery *Lone Pine* orders that required plaintiffs to provide expert affidavits specifying the injuries suffered by each plaintiff, the substances causing the injury, the dates and circumstances of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions. *Acuna*, 200 F.3d at 338. The district court ultimately dismissed plaintiffs' claims for failure to comply with the *Lone Pine* orders. *Id.* at 340. On appeal, plaintiffs challenged the *Lone Pine* orders as imposing too high a burden at too early a stage in the

litigation. *Id.* This court stated that "[i]n the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under FED. R. CIV. P. 16." *Id.* The court then held that the *Lone Pine* orders

> essentially required that information which plaintiffs should have had before filing their claims pursuant to FED. R. CIV. P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries.

Id. (citing *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999)). Thus, the *Acuna* court concluded that the district court did not commit an abuse of discretion by dismissing plaintiffs' claims for failure to comply with the *Lone Pine* order. *Id.* at 341.

The Dier plaintiffs contend that this case is distinguishable from *Acuna* because here the plaintiffs have alleged precise injuries and both the court and Merck are on notice of the nature of the injuries and the injuries' relationship to Merck's conduct. These grounds are insufficient, however, to warrant bypassing the clear holding in *Acuna* that it is within a court's "discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require." *Id.* at 340.

2. Requirement of Proof of Physical Injury for Emotional Distress Claims

The Dier plaintiffs also argue that PTO 28 was improper because expert testimony is not required for claims of negligent infliction of emotional distress under New York law.[4] But the Dier plaintiffs all pleaded physical injuries, and none attempted to withdraw those physical injury claims. Thus, PTO 28 would apply regardless of whether the Dier plaintiffs might have had a viable negligent infliction of emotional distress claim along with their physical injury claims.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

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4. "[T]he substantive law of each plaintiff's home jurisdiction must be applied to his or her respective claims." *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006).

APPENDIX B — PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 19, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30446

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

GLENN L. DIER,

Plaintiff - Appellant

v.

MERCK AND COMPANY, INC.,
A Foreign Corporation,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Opinion 7/16/10, 5 Cir., ____, _____, F.3d _____)

Before GARWOOD, STEWART, and CLEMENT, Circuit Judges.

Appendix B

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX C — ORDER & REASONS OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA FILED APRIL 28, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MDL NO. 1657

SECTION: L

IN RE: VIOXX PRODUCTS LIABILITY LITIGATION

JUDGE FALLON

MAG. JUDGE KNOWLES

THIS DOCUMENT RELATES TO: CASES LISTED ON EXHIBITS A & B

ORDER & REASONS

Currently pending before the Court are the cases of certain plaintiffs subject to this Court's Order to Show Cause Why Cases Should Not be Dismissed for Failure to Comply with Pre-Trial Orders 28 and 29 (Rec. Doc. 17108), and certain plaintiffs' Cross-Motions for Miscellaneous Relief (Rec. Docs 17574, 17575). For the following reasons, the Plaintiffs' cross-motions are DENIED, and their claims are hereby DISMISSED WITH PREJUDICE.

Appendix C

I. FACTUAL BACKGROUND

On November 9, 2007, the parties announced the establishment of a Vioxx Resolution Program that encompasses all claims alleging a heart attack, sudden cardiac death, or stroke.[1] Also on that date, the Court entered two pre-trial orders requiring plaintiffs and tolling agreement claimants to produce specified information regarding their claims if they are not eligible for or have not submitted their claims to the Vioxx Resolution Program. Under Pre-Trial Order No. 28 ("PTO 28"), plaintiffs and tolling agreement claimants with claims pending as of November 9, 2007, must provide case-specific expert reports to Merck by certain dates based on the first letter of the plaintiff's last name. Plaintiffs whose last names begin with the letters A through L were initially required to submit this information by May 1, 2008, and plaintiffs whose last names begin with the letters L through Z were initially required to submit this information by July 1, 2008. Pre-Trial Order No. 29 ("PTO 29") imposes similar requirements on plaintiffs whose claims are filed or transferred to the MDL after November 9, 2007. PTO

1. For a more detailed factual background describing the events that took place prior to the inception of this Multidistrict Litigation, see *In re Vioxx Prods. Liab. Litig.*, 401 F. Supp. 2d 565 (E.D. La. 2005) (resolving *Daubert* challenges to a number of expert witnesses). For a more detailed factual background describing the terms of the Vioxx Master Settlement Agreement and the events that took place after the parties reached a settlement, see *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 2008 WL 3285912 (E.D. La. Aug. 7, 2008) (denying third-party payors' motions to enjoin interim payments).

29 also sets deadlines, but it does so by reference to the date a claim is filed in, or transferred to, the MDL, rather than by reference to a specific calendar date. *(See* PTO 29 at 3 (requiring each plaintiff to comply with discovery requirement within 45 days of filing a claim in the MDL, or within 45 days of transfer to the MDL, if the case was filed elsewhere)).

On December 10, 2007, certain plaintiffs, all of whom are represented by attorney Ronald Benjamin, appealed PTO 28 to the United States Court of Appeals for the Fifth Circuit. The plaintiffs sought to have the Fifth Circuit vacate this Court's requirement that plaintiffs produce case-specific expert reports. On March 28, 2008, the Fifth Circuit dismissed the plaintiffs' appeal without an opinion. *See In re Vioxx Prods. Liab. Litig.*, Case No. 07-31164 (5th Cir. March 28, 2008) (per curiam).

On April 17, 2008, certain other plaintiffs filed a motion to suspend or modify the requirements of PTO 28. These plaintiffs argued that it was premature to require case-specific expert reports from those plaintiffs who alleged injuries for which the PSC had not yet developed general causation expert reports. According to these plaintiffs, PTO 28 did not allow eligible plaintiffs who chose not to enroll in the settlement sufficient time to develop expert reports or obtain new counsel. These plaintiffs essentially argued that PTO 28 "is unfair and unilaterally slanted in favor of Merck, both in general and specific causation." *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008).

Appendix C

On May 30, 2008, the Court granted in part and denied in part the plaintiff's motion to vacate PTO 28, explaining that PTO 28 "is a type of pre-trial order commonly known as a *Lone Pine* order," and that "[t]he United States Court of Appeals for the Fifth Circuit has recognized the value of and approved the use of *Lone Pine* orders in mass tort litigation." *Id.* (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (holding that it is within a district court's discretion to issue a *Lone Pine* scheduling order that essentially requires the production of "information that plaintiffs should have had before filing their claims")). In light of the advanced stage of the Vioxx litigation, the Court explained that, after nearly a decade of discovery, "it is not too much to ask a plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether the injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady." *Id.*[2] To ensure that all plaintiffs had a fair opportunity to comply with the requirements of PTO

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2. The Court went on to explain that PTO 28 was particularly appropriate given the advanced stage of the Vioxx litigation, both in the federal MDL and the state courts:

> [I]n the present case, a *Lone Pine* order may not have been appropriate at an earlier stage before any discovery had taken place since little was known about the structure, nature and effect of Vioxx by anyone other than perhaps the manufacturer of the drug. But this case is no longer in its embryonic stage. It has existed in state courts for over seven years and in this Court for over three years, and much discovery has taken place .... For nearly a

(Cont'd)

28, however, the Court granted the plaintiffs' request to extend the deadlines for providing case-specific expert reports, providing that plaintiffs whose last names begin with the letters A through L would be required to submit their reports by July 1, 2008, and claimants whose last names begin with the letters M through Z would be required to submit reports by August 1, 2008. *Id.*

One month later, on June 30, 2008—the day before their PTO 28 filings were due—attorney Ronald

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(Cont'd)

> decade, Plaintiffs' counsel throughout the country have been studying, exploring, and discovering all of the effects of Vioxx on the human body. In this MDL, the PSC did not selectively discover only MI's or strokes, but rather they conducted general discovery on the effects Vioxx may or may not have on individuals. All of this material is and has been available to counsel in the individual cases.
>
> The Court finds that at this advanced stage of the litigation, it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether that injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady. Surely if Plaintiffs' counsel believe that such claims have merit, they must have some basis for that belief; after all this time it is reasonable to require Plaintiffs to come forward and show some kind of basic evidence of specific causation.

In re Vioxx Prods. Liab. Litig., 557 F. Supp. 2d at 744.

Benjamin's clients filed a motion seeking miscellaneous relief, including extension of the deadlines to produce expert reports to October 31, 2008, this Court's recusal, and, in the alternative, an order vacating PTOs 28 and 29 or vacating the Master Settlement Agreement. On November 5, 2008, five days after the latest deadline proposed in his earlier motion, Mr. Benjamin filed a request for a pre-motion conference to stay any further motions by Merck seeking dismissal for noncompliance with PTO 28. On December 10, 2008, the Court denied the plaintiffs' motion and request in its entirety. *See* Rec. Doc. 17394.

II. PRESENT MOTIONS

On November 26, 2008, Merck filed its Third Motion for Order to Show Cause Why Certain Plaintiffs' Cases Should Not be Dismissed for Failure to Comply with the Court's *Lone Pine* Orders. *See* Rec. Doc. 16989. On December 3, 2009, the Court granted the motion and ordered the plaintiffs, all of whom are represented by attorney Ronald Benjamin, to show cause on January 9, 2009, why their cases should not be dismissed for failing to produce case-specific expert reports. *See* Rec. Doc. 17108.

The majority of the plaintiffs subject to the order did not produce expert reports, but instead filed responses in opposition to the show cause order, asserting a variety of reasons in support of their argument that the deadlines imposed by PTO's 28 and 29 either do not apply to them or should be modified or

extended. In addition, the plaintiffs also filed cross-motions for various relief, including, *inter alia*, extensions of time to comply, and this Court's recusal from any further consideration of their motions.

III. LAW & ANALYSIS

This Court has previously held that PTOs 28 and 29 are enforceable, that the deadlines for compliance will not be extended further, and that recusal is not warranted given the facts of this case. *See In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008); Order & Reasons, Rec. Docs. 17394. For purposes of this opinion, the Court adopts its earlier reasoning and finds that the plaintiffs' redundant requests for recusal, additional extensions of time, or modification of PTOs 28 and 29 are without merit.

Further, the Court has afforded the plaintiffs more than enough time to comply with PTOs 28 and 29. Indeed, the plaintiffs have had since November 2007 to produce case-specific expert reports but have failed to do so. Even after counsel's earlier appeal was denied by the Fifth Circuit without an opinion, the Court extended the deadlines for compliance to afford all plaintiffs additional time to produce case-specific expert reports. Since then, the Court has repeatedly enforced PTOs 28 and 29 as to plaintiffs who have failed to comply with the deadlines. These plaintiffs do not warrant any additional consideration beyond that which the Court has afforded to other plaintiffs also subject to PTOs 28 and 29. Indeed, it is now a year and a half since many of the plaintiffs in these cases were first directed to produce expert reports, but, rather than simply comply

with the Court's orders, their attorney continues to argue that the deadlines are either too harsh or are inapplicable. As a result, the plaintiffs' request for further extensions is, to say the least, not persuasive. In addition, the Court finds that the plaintiffs' attorney's argument that dismissal is inappropriate as to any plaintiffs who have only partially complied with the order is similarly without merit. The plaintiffs have had more than enough time to cure any deficiencies in their submissions. At this stage of the proceedings, dismissal with prejudice is the only appropriate remedy for the plaintiffs' repeated failure to produce reports in accordance with PTOs 28 and 29.

Mr. Benjamin's attempts to circumvent valid discovery orders on behalf of his clients are not unique to this litigation. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 30 F. App'x 27, 28-29 (3d Cir. 2002). In the *In re Diet Drugs* litigation, the Third Circuit affirmed the district court's dismissal of certain of Mr. Benjamin's cases for failure to comply with similar discovery orders. As the Third Circuit explained, "counsel had numerous opportunities to comply with the District Court's long-standing discovery order, yet stubbornly clung to his argument that he should not have to [do so]. Neither multiple express rejections of this already-rejected argument, nor threats of dismissal ameliorated counsel's defiance of the discovery schedule." *Id.* Describing Mr. Benjamin's numerous discovery abuses as "a parade of obstinance," the Third Circuit explained that his refusal to comply with the district court's discovery orders had

"ultimately cost his clients their day in court." *Id.*[3] Given this history, it is unfortunate, though perhaps not surprising, that Mr. Benjamin has attempted to pursue the same failed tactics in this litigation.

IV. CONCLUSION

IT IS ORDERED that the plaintiffs' cross-motions (Rec. Docs. 17574, 17575) are DENIED.

IT IS FURTHER ORDERED that the plaintiffs listed in Exhibits A and B are hereby DISMISSED WITH PREJUDICE.[4]

New Orleans, Louisiana, this 28th day of April, 2009.

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

3. Recently, the Superior Court of New Jersey, one of the coordinate Vioxx jurisdictions, denied Mr. Benjamin admission to practice *pro hac vice*, because the court found that, among other things, Mr. Benjamin had failed to disclose a lengthy history of ethical violations and sanctions in his application to practice *pro hac vice*.

4. During the course of briefing, the parties advised the Court that a number of the plaintiffs initially subject to the show cause order are now in compliance. These plaintiffs, all of whom have been excepted from the scope of this order, include Scott Berthel, Matthew Cavallo, Richard F. Core, Marjorie Curtis, James Demoski, Edward Henderson, Kristina Hia, Maurice Hoyt, Mary Kurtz, Wilson Lord, Ann M. Mannino, Arthur Pratt, Viola Santacrose, Frank Spencer, and Timothy Mack. The remaining plaintiffs listed on Exhibits A and B have either provided no discovery at all or have provided some discovery but have failed to produce case-specific expert reports as set forth in PTOs 28 and 29.

EXHIBIT A: PLAINTIFFS SUBJECT TO PTO 28

CASE	DOCKET NUMBER	PLAINTIFF LAST NAME	FIRST NAME	MIDDLE
Agard v. Merck & Co., Inc.	2:05-cv-01089	Darrow	Rodney	
Agard v. Merck & Co., Inc.	2:05-cv-01089	O'Connor	Ronald	R
Aljibory v. Merck & Co., Inc.	2:05-cv-01090	Aljibory	Adnan	A
Aljibory v. Merck & Co., Inc.	2:05-cv-01090	Robinson	Rosanna	
Cavallo v. Merck & Co., Inc.	2:05-cv-01513	DeRosa	Alphonse	V
Cavallo v. Merck & Co., Inc.	2:05-cv-01513	Smith	Victoria	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Connolly	Marjorie	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Donahue	Kristina	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Harris, Jr.	Charles	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Hickok	Sheila	L
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Hochrun	Joanne	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Holdredge	Suzanne	
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Kunik	Frank	P
Connolly v. Merck & Co., Inc.	2:06-cv-02708	Patrick	William	
DeVincentiis v. Merck & Co., Inc.	2:06-cv-02297	DeVincentiis	Carlo	
DeVincentiis v. Merck & Co., Inc.	2:06-cv-02297	Lindsey	Kimberly	
Dier v. Merck & Co., Inc.	2:05-cv-01088	Dier	Glenn	L
Gates v. Merck & Co., Inc.	2:05-cv-05221	Gates	Robert	
Gates v. Merck & Co., Inc.	2:05-cv-05221	Gehm	Herbert	
Hoffner v. Merck & Co., Inc.	2:05-cv-02238	Carniero	Manuel	
Hoffner v. Merck & Co., Inc.	2:05-cv-02238	Hoffner	Kathleen	
Hoffner v. Merck & Co., Inc.	2:05-cv-02238	Roman	Thomas	J
Holobosky v. Merck & Co., Inc.	2:05-cv-01091	Holobosky	Rosemary	T
Holobosky v. Merck & Co., Inc.	2:05-cv-01091	Smith	Sheila	
Holobosky v. Merck & Co., Inc.	2:05-cv-01091	Sullivan	Thomas	J

EXHIBIT B: PLAINTIFFS SUBJECT TO PTO 29

CASE	DOCKET NUMBER	PLAINTIFF LAST NAME	FIRST NAME	MIDDLE
Adelberg v. Merck & Co., Inc.	2:08-cv-04173	Adelberg	Carol	
Adelberg v. Merck & Co., Inc.	2:08-cv-04173	Amendoeira	Antonio	
Alapeck v. Merck & Co., Inc.	2:08-cv-03221	Alapeck	Geraldine	M
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Alapeck	Geraldine	M
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Bilik	Helen	
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Boone	Elizabeth	
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Croft	Carolyn	S
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Mahar	Mary	J
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Sanatcrose	Dean	
Bilik v. Merck & Co., Inc.	2:08-cv-04172	Simmons	Stasia	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Cadwell	Albert	D
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Cadwell	Samuella	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Corprew	Wilbert	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Plocek	Elsa	
Cadwell v. Merck & Co., Inc.	2:08-cv-04167	Schaffer	Ronald	H
Croft v. Merck & Co., Inc.	2:08-cv-04171	Croft	Caroline	S
Mahar v. Merck & Co., Inc.	2:08-cv-03222	Mahar	Mary	J
Pitcher v. Merck & Co., Inc.	2:08-cv-04170	Pitcher	Kevin	
Raftis v. Merck & Co., Inc.	2:08-cv-04166	Raftis	Marianne	
Santacrose v. Merck & Co., Inc.	2:08-cv-04168	Santacrose	Dean	
Steinhoff v. Merck & Co., Inc.	2:08-cv-04169	Steinhoff	Margaret	